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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-730

COMMONWEALTH OF PUERTO RICO AND PUERTO RICO WATER RESOURCES AUTHORITY,
Petitioners

v.

COMMONWEALTH OIL REFINING COMPANY, INC., ET AL.,
Respondents

Brief In Opposition To The Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

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SUBJECT INDEX

	Page
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	3
1. THE CENTRAL QUESTION OF CORCO'S PRINCIPAL PLACE OF BUSINESS IS A QUESTION OF FACT, PROPERLY DECIDED BY THE BANKRUPTCY COURT TO BE SAN ANTONIO, THAT DOES NOT REQUIRE FURTHER APPELLATE REVIEW BY THIS COURT UNDER THE CLEARLY ERRONEOUS STANDARD.	3
2. THE BANKRUPTCY COURT'S DISCRETIONARY DECISION DECLINING TO TRANSFER THESE PROCEEDINGS TO PUERTO RICO HAS BEEN AFFIRMED BY TWO APPELLATE COURTS AND DOES NOT REQUIRE FURTHER APPELLATE REVIEW BY THIS COURT UNDER AN ABUSE OF DISCRETION STANDARD.	6
3. THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH DECISIONS OF OTHER COURTS.	9
CONCLUSION	13
CERTIFICATE OF SERVICE	14

LIST OF AUTHORITIES

CASES	Page
Clark Bros. Co. v. Portex Oil Co., 113 F.2d 45, 47 (9th Cir. 1940)	5
Guarantee Acceptance Corp. v. Fidelity Mortgage Investors, 544 F.2d 449, 452 (10th Cir. 1976)	4, 5, 11
In re Portex Oil Co., 30 F. Supp. 138, 140 (D. Ore. 1939), *aff'd sub. nom.*, Clark Bros. v. Portex Oil Co., 113 F.2d 45 (9th Cir. 1940)	10
Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923)	9, 12

CASES

	Page
Riggs v. Island Creek Coal Co., 542 F.2d 339, 342 (6th Cir. 1976)	4
Shahmoon Indust., Inc. v. Imperato, 338 F.2d 449, 451 (3rd Cir. 1964)	4

UNITED STATES STATUTES

11 U.S.C.A. § 11(a)(1)	10
28 U.S.C. § 1332(c)	12
28 U.S.C. § 2075	3

UNITED STATES SUPREME COURT RULES

Rule 19	6, 8, 9, 12, 13
Rule 40(3)	1

BANKRUPTCY RULES

Rule 116	3, 10, 11, 12
Rule 116(a)	7, 12
Rule 116(a)(2)	2, 3
Rule 116(b)	7, 8
Rule 116(b)(1)	2, 7
Rule 752	5
Rule 810	5

TEXTS

1 J. Moore, *Federal Practice* ¶ 0.77[3.-4], at 717.80 (2d ed. 1978)	12
13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3625 (1975)	6, 12

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Respondents, Commonwealth Oil Refining Company, Inc., and various of its affiliates and subsidiaries (hereinafter jointly referred to as "Corco"), file this Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. Pursuant to U. S. Sup. Ct. Rule 40(3), Corco accepts petitioners' statements of the opinions below, jurisdiction and the relevant statutory provisions.

QUESTIONS PRESENTED

1. Was the bankruptcy court, pursuant to the venue provisions of Bankruptcy Rule 116(a)(2), clearly erroneous in finding Corco's principal place of business to be San Antonio, Texas, where these Chapter XI arrangement proceedings were filed?
2. Did the bankruptcy court abuse its discretion in declining to transfer these proceedings to Puerto Rico?

STATEMENT OF THE CASE

On March 2 and 3, 1978, Corco commenced these proceedings by filing original petitions under Chapter XI of the Bankruptcy Act in the San Antonio Division of the Western District of Texas, San Antonio being the location of Corco's principal place of business. By these Chapter XI business arrangement proceedings, Corco seeks to rehabilitate itself financially in the bankruptcy court while continuing, with minimal disruption, its day-to-day operations.

Petitioners filed an objection to venue and moved to transfer these proceedings to the United States District Court for the District of Puerto Rico. Following a four-day evidentiary hearing, the bankruptcy court entered extensive findings of fact that Corco's principal place of business is in San Antonio, and that venue of these proceedings thus is proper. The bankruptcy court, following a full and written discussion of the relevant factors, further declined to transfer these proceedings to Puerto Rico as urged by petitioners pursuant to Bankruptcy Rule 116(b)(1).

Petitioners thereupon appealed to the district court which, although disagreeing with the bankruptcy court's factual determination of Corco's principal place of business, affirmed the bankruptcy court's denial of petitioners' motion to transfer to Puerto Rico. Petitioners then appealed to the United States Court of Appeals for the Fifth Circuit which unanimously affirmed the bankruptcy court's fact judgment that Corco's principal place of business is in San Antonio and the two lower courts' discretionary determination that these proceedings properly are retained in San Antonio. The Fifth Circuit denied petitioners' motion for rehearing en banc. Petitioners now seek issuance of a writ of certiorari to review the judgment and opinion of the Fifth Circuit.

REASONS FOR DENYING THE WRIT

1. THE CENTRAL QUESTION OF CORCO'S PRINCIPAL PLACE OF BUSINESS IS A QUESTION OF FACT, PROPERLY DECIDED BY THE BANKRUPTCY COURT TO BE SAN ANTONIO, THAT DOES NOT REQUIRE FURTHER APPELLATE REVIEW BY THIS COURT UNDER THE CLEARLY ERRONEOUS STANDARD.

Bankruptcy Rule 116(a)(2), promulgated to be effective in 1974, sets forth the general rule for corporations that venue in Chapter XI arrangement proceedings is proper in a district in which the debtor has *either* its principal assets *or* its principal place of business.[1]

1. Bankruptcy Rule 116, adopted by this Court in 1974 and made applicable to Chapter XI proceedings by Chapter XI, Rule 11-13, now establishes the guidelines for proper venue in these proceedings. By virtue of 28 U.S.C. § 2075, Rule 116 supersedes Sec-

Corco's principal assets are in Puerto Rico. The venue question raised by petitioners in the bankruptcy court, and which petitioners are asking this Court to review, is whether Corco's principal place of business is in San Antonio, where Corco's corporate headquarters are located and these proceedings filed, or in Puerto Rico. This is not the type of question that warrants this Court's special attention.

As noted by the Fifth Circuit below, consistent with other courts of appeal, the location of a corporation's principal place of business is a question of fact. *See, e.g., Guarantee Acceptance Corp. v. Fidelity Mortgage Investors,* 544 F.2d 449, 452 (10th Cir. 1976); *Riggs v. Island Creek Coal Co.,* 542 F.2d 339, 342 (6th Cir. 1976); *Shahmoon Indust., Inc. v. Imperato,* 338 F.2d 449, 451 (3rd Cir. 1964). Following a four-day hearing devoted to the question of Corco's principal place of business, the bankruptcy court entered an extensive opinion detailing Corco's organizational and management structure, its revenue and debt structure, the location of personnel, assets and facilities, and all other aspects of its corporate operations. The bankruptcy court found on the basis of the evidence adduced at the hearing and numerous and detailed subsidiary findings of fact that Corco's executive and management offices are located in San Antonio, that its overall business and financial operations, both external and internal, are managed and controlled from its San Antonio headquarters, and that

tion 2a(1) of the Bankruptcy Act which governed venue determinations prior to 1974. Section 1472 of the new Bankruptcy Code, which governs venue in proceedings filed on or after October 1, 1979, perpetuates the dual tests of "principal place of business" and situs of "principal assets" as available venue alternatives.

Corco's principal place of business is in San Antonio.[2] The bankruptcy court's opinion, appended to petitioners' application as Appendix "E", offers a full review of the facts. The opinion of the Fifth Circuit, appended to petitioners' application as Appendix "C", also details the bankruptcy court's findings.

As correctly noted by the Fifth Circuit, a bankruptcy court's principal place of business determination is reviewable on appeal under the strict "clearly erroneous" standard. 596 F.2d at 1247; *Guarantee Acceptance Corp. v. Fidelity Mortgage Investors, supra* at 452; *Clark Bros. Co. v. Portex Oil Co.,* 113 F.2d 45, 47 (9th Cir. 1940); *see* Bankr. Rules 752, 810, Rules of Bankruptcy Procedure. Petitioners have been afforded appellate review of the bankruptcy court's fact determination under this "clearly erroneous" test in two appellate courts. The Fifth Circuit has upheld the bankruptcy court's fact conclusion as not only *not* clearly erroneous, but also as correct.[3]

2. Petitioners flatly state in their Statement of the Case at page 5 that "Corco conducts no business in San Antonio." Such a statement is ludicrous in light of the evidence presented to the bankruptcy court and documented in the court's detailed findings of fact. Petitioners continue to rely and expand upon the income tax-related statement of Mr. Frank H. Wetzel, Corco's senior financial officer, who, at the outset of questioning by counsel for petitioners as to how Corco classifies its corporate operations for federal income tax purposes, i.e., domestic or foreign, acknowledged that Corco, excluding its wholly owned affiliates, is not engaged in business in San Antonio. (Tr. 321). One need merely read the entire federal income tax discussion by Mr. Wetzel to understand the tax-related intent of his statement, and the bankruptcy court's doubts as to the relevance of such technical income tax classifications. (Tr. 321-331).

3. Petitioners in footnote 3 of their Petition erroneously attribute to the Fifth Circuit in quoted form a recitation of those facts that tie Corco to Puerto Rico. This recitation was not made by the Fifth Circuit. Rather, the quoted language is the language of the district court in support of its judgment that Puerto Rico and not San Antonio should be deemed Corco's principal place of business. (Pe-

There is no reason why this Court need allow petitioners a third appellate forum to argue the correctness of the bankruptcy court's finding under the "clearly erroneous" standard. The facts at issue relating to Corco's corporate structure and operations are unique and peculiar to Corco, and important only to the parties to these proceedings. A review by this Court would involve nothing more than application of the familiar "clearly erroneous" standard to these particular facts and recognition of the axiom well established in the circuit and district courts that principal place of business determinations depend on the facts of each case. *See generally* 13 C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3625, at 802 (1975) (hereinafter "WRIGHT"). The question of a particular corporation's principal place of business simply is not certiorari material within the guidelines of U.S. Sup. Ct. Rule 19.

2. THE BANKRUPTCY COURT'S DISCRETIONARY DECISION DECLINING TO TRANSFER THESE PROCEEDINGS TO PUERTO RICO HAS BEEN AFFIRMED BY TWO APPELLATE COURTS AND DOES NOT REQUIRE FURTHER APPELLATE REVIEW BY THIS COURT UNDER AN ABUSE OF DISCRETION STANDARD.

The Court should be even less inclined to consider whether the bankruptcy court abused its discretion in declining to transfer these proceedings to Puerto Rico, as was urged by petitioners pursuant to Bankruptcy Rule 116(b)(1). Both appellate courts below, applying the "abuse of discretion" standard, have affirmed the bankruptcy court's decision to retain these proceedings in San Antonio. Even the district court, while deciding Corco's principal place of business and principal assets both to be in Puerto Rico, determined that the interest of justice and convenience of the parties warranted retention of these proceedings in San Antonio.

In sum, Rule 116(b) vests in the bankruptcy court discretion (1) to transfer proceedings to *any* district, even if venue is proper where filed; or (2) to retain the proceedings, even if venue is not proper where filed. This complete geographic discretion accorded the bankruptcy court, without regard to where venue is technically proper under subsection (a) of Rule 116, is governed by the dual criteria of the interest of justice and the convenience of the parties.

The bankruptcy court enunciated and discussed six factors in shaping its decision: (1) the proximity of creditors of every kind to the court; (2) the proximity of the debtor to the court; (3) the proximity of the witnesses necessary to the administration of the estate; (4) the location of books, records and assets; (5) the economic administration of the estate; and (6) the necessity for ancillary administration if a "straight" bankruptcy should result. (Petitioners' Appendix "E", at 25-32). The bankruptcy court also expressly considered the interests of petitioners. Both the district court and the Fifth Circuit wholly approved and affirmed the bankruptcy court's discussion of the relevant factors, and its denial of peti-

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tioners' Appendix "D", at 4 n.1). The Fifth Circuit in the course of its analysis of the district court's approach merely quoted the district court's discussion. It is important that this Court appreciate that the Fifth Circuit, while acknowledging the district court's principal place of business finding by quoting the district court's short recitation of key facts, specifically rejected the district court's analysis and reversed the district court's conclusion.

tioners' motion to transfer. Indeed, the Fifth Circuit stepped from behind the available "abuse of discretion" shield and concluded its opinion by cogently noting why in its opinion the interests of all parties, including petitioners, are best served by Corco being able to maintain these proceedings in San Antonio where it chose to file them:

> "The government [of Puerto Rico] contends that the overwhelming concern of Puerto Rico with the continued operations of CORCO require a transfer of this case to Puerto Rico. We disagree. Without belittling in the least the extent of Puerto Rico's interest in CORCO, that interest is served by maintaining CORCO as a functioning refinery. This can best be accomplished in San Antonio. The troubles of CORCO are financial. The people who can solve these problems for CORCO are in San Antonio. The bankruptcy court found . . . that it will be less disruptive to the continued operation of CORCO if this case is retained in San Antonio." 596 F.2d at 1248.

The bankruptcy court's decision under Bankruptcy Rule 116(b) was a proper use of its broad discretion. Both the district court and Fifth Circuit have affirmed the bankruptcy court. There is no need for this Court as a third appellate court to expend its valuable time to review again under the "abuse of discretion" standard the bankruptcy court's exercise of discretion not to transfer Corco's Chapter XI proceedings to Puerto Rico. None of the special purposes for which the writ of certiorari is designed, as set forth in U. S. Sup. Ct. Rule 19, would be advanced by such review.

3. THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH DECISIONS OF OTHER COURTS.

Petitioners allege that the Fifth Circuit's opinion affirming the bankruptcy court's finding that San Antonio is the site of Corco's principal place of business is in conflict with other federal court decisions, including earlier decisions in the Fifth Circuit. Simply stated, there is not a "real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals", *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923), or between the Fifth Circuit and this Court on the issues raised in this appeal. *See* U.S. Sup. Ct. Rule 19(1)(b).

Petitioners attempt to create a "conflict" between the Fifth Circuit decision and certain circuit and district court opinions cited at pages 12 and 13 of the Petition by pointing out that these decisions determined a particular corporation's principal place of business to be the location where its principal assets were concentrated and its physical operations conducted. Any such "conflict" is not legal; it is factual. As noted previously, it is axiomatic that the results in these decisions, and indeed in all opinions that have considered the fact issue of a corporation's principal place of business under any statute or rule, turned on the particular facts of each corporation's structure and operation, and the significance that the court determined should be attributed to each factor on the basis of the corporation's overall existence. One can pick out special facts in each decision cited by petitioners that explain and justify the particular result reached. There simply exists no real conflict among the circuits

on the principal place of business question, including the Fifth Circuit, and especially is there no conflict in the bankruptcy context under Bankruptcy Rule 116.

Petitioners, however, further attempt to create a "conflict" by focusing on the Fifth Circuit's cogent discussion of the significance of the expanded venue alternatives made available by Bankruptcy Rule 116 for Chapter XI proceedings and the diminished vitality of decisions prior to 1974 that construed the prior venue statute. The Fifth Circuit recognized the obvious. Prior to 1974, venue in Chapter XI proceedings was limited under Section 2a(1) of the Bankruptcy Act, 11 U.S.C.A. § 11(a)(1), to the corporation's principal place of business. Courts necessarily focused on the location of assets as a significant factor under this test. By this Court's adoption of Bankruptcy Rule 116 in 1974, venue in Chapter XI proceedings was expanded to include either the corporation's principal place of business *or* the place of its principal assets. The Fifth Circuit correctly and logically noted that because the situs of a corporation's principal assets is now set out as a separate and distinct test for proper venue, emphasis on the location of these same assets is no longer appropriate in the principal place of business determination. 596 F.2d at 1244-45. Although relevant to the principal place of business, the situs of principal assets should not control both of the venue alternatives. *See In re Portex Oil Co.*, 30 F. Supp. 138, 140 (D. Ore. 1939), *aff'd sub. nom., Clark Bros. v. Portex Oil Co.*, 113 F.2d 45 (9th Cir. 1940) (applying the analogous venue provision in Chapter X proceedings).

The Fifth Circuit thereupon proceeded to "clean house" in this Circuit and to note that the freshness of its de-

cisions under the more limited and earlier venue statute has been soured by Rule 116's expansion of venue alternatives to include the situs of principal assets as a separate basis for venue, apart from the corporation's principal place of business. Decisions prior to the adoption of Rule 116 properly are distinguisnable on this basis. To the extent petitioners rely upon such pre-Rule 116 decisions as support for a claimed "conflict", those decisions are temporally distinguishable and out-of-date.

The Fifth Circuit's discussion is consistent with the more liberal and expanded venue provisions of Rule 116 and is not in conflict with any case decisions under Rule 116, of which there are only a handful. Indeed, the only circuit decision cited by petitioners as being in conflict is the Tenth Circuit Court of Appeals' application of the analogous Chapter X venue provisions in *Guarantee Acceptance Corp. v. Fidelity Mortgage Investors, supra.* The facts of Guarantee Acceptance Corporation's corporate existence are significantly at odds with Corco's structure and operations. The Tenth Circuit's determination that Guarantee's principal place of business and principal assets both are in California is without doubt correct. However, petitioners attempt to create a conflict on the basis of the Tenth Circuit's correct statement that a corporation's headquarters and offices are not necessarily its principal place of business and that all factors must be considered in making the determination. 544 F.2d at 452. Petitioners do not identify the conflict created by the Tenth Circuit's observations. The Fifth Circuit, by affirming the bankruptcy court's finding on the basis of an extensive record that Corco's principal place of business is in San Antonio at the site of its management offices,

obviously has not declared that the location of a corporation's headquarters necessarily is its principal place of business, as petitioners indirectly suggest.

Finally, petitioners seek issuance of a writ of certiorari on the basis of the Fifth Circuit's recognition in footnote 17 of its decision that the "principal place of business" test for corporate citizenship under 28 U.S.C. § 1332(c) was added in 1958 in order to *restrict* diversity jurisdiction while still affording protection to nonresident litigants, whereas the adoption of Bankruptcy Rule 116 *expands* venue choices for corporations filing Chapter XI arrangement proceedings. The Fifth Circuit briefly noted that these contrasting policy concerns of restrictive federal court jurisdiction versus expansive corporate venue in Chapter XI proceedings should be kept in mind in assessing the relevance of earlier decisions to a particular principal place of business determination. The Fifth Circuit's footnote observation is consistent with other authorities that also have recognized the need to respect this difference in policy concerns. *See generally* 13 WRIGHT, *supra* § 3625, at 788 and n.3; 1 J. Moore, FEDERAL PRACTICE ¶ 0.77[3.-4], at 717.80 (2d ed. 1978), and cases cited therein.

Unlike numerous petitions for certiorari that raise substantial and difficult questions as to whether a conflict exists warranting the grant of certiorari, such is not the case here. There is no real, substantive conflict in legal principles as to a corporation's principal place of business under Bankruptcy Rule 116(a). Petitioner has not established a conflict or other basis for the grant of certiorari within the contours of U.S. Sup. Ct. Rule 19 and this Court's opinion in *Layne & Bowler Corp. v. Western Well Works, Inc., supra.*

CONCLUSION

The two questions raised by this venue appeal are: (1) whether the bankruptcy court's ultimate finding of fact that Corco's principal place of business is in San Antonio is "clearly erroneous" and (2) whether the bankruptcy court's discretionary determination to retain these Chapter XI arrangement proceedings in San Antonio constitutes an "abuse of discretion". The bankruptcy court's decision that these proceedings are proper in San Antonio has been affirmed by both the district court and the Fifth Circuit. No difficult or substantial legal questions are presented, nor does any conflict in legal principle exist between the Fifth Circuit decision and decisions of other circuit courts or of this Court. Thus, there are no "special and important" reasons for the granting of certiorari, as required by U.S. Sup. Ct. Rule 19.

For these reasons, petitioners' application for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing have been served on each of the following parties by placing the same, postage prepaid, certified mail, return receipt requested, in the United States Mail, on this the _____ day of December, 1979:

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